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Comment: Unconstitutional Accountability in the Department of Veterans Affairs

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UNCONSTITUTIONAL ACCOUNTABILITY IN THE DEPARTMENT OF VETERANS AFFAIRS

Ian Pomplin*

*The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat. 862 (2017) was enacted into law on June 23, 2017, in an effort to reform a troubled government agency that has had the media shine a spotlight on its abuses and waste. This new law significantly lowers the standard of evidence to take adverse actions against federal employees at the Department of Veterans Affairs, overrides collective bargaining agreements, and greatly shortens notice and response time periods that are constitutionally guaranteed. This comment will discuss the history of due process in federal employment, assess the constitutionality of the new law through the *Matthews v. Eldridge* balancing test, and determine if its requirements violate the Due Process Clause. This comment suggests that the law is counterproductive, leading to a further deterioration of the Department of Veterans Affairs. Lastly, this comment will investigate the challenges involved in working to overturn or repeal this law. The Federal Circuit Court of Appeals is ill equipped to handle federal employee due process claims. The law and others like it have been passed with broad bipartisan support, which will make it hard for the legislature to change course.*

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I. INTRODUCTION

On June 23, 2017, the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017¹ (Accountability Act) was enacted into law in an effort to reform the Department of Veterans Affairs (VA). The Department had been rocked by recent scandals in 2014 involving government employees that had falsified documents, outbreaks of disease, long waitlists, and retaliation against whistleblowers.² An accountability bill was soon passed by the House of Representatives to combat this scandal, and was targeted at senior executives at the VA.³ That law did not end the issues plaguing the Agency, and Congress decided that the increased accountability needed to be applied to workers that were not working in executive positions.⁴ The 2017 Accountability Act, enacted as a remedy, violates federal public sector employees' constitutionally granted rights.

II. THE HISTORY OF FEDERAL PUBLIC EMPLOYMENT

The history of just cause and due process in the federal civil service stems from two places; 1) a series of congressional acts and executive orders modifying the acts, and 2) a line of judicial precedent in regards to the Fifth Amendment due process clause, which states, "No person shall [. . .] be deprived of life, liberty, or property, without due process of law".⁵ The Supreme Court has since incorporated the Fifth Amendment due process clause to the states; in addition to stating that a public employee has a property right in his job,⁶ so all levels of government need to provide due

1. Dep't. of Veterans Aff. Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, Stat. 862 (2017).

2. Katie Zezima, *Everything you need to know about the VA and the scandals engulfing it*, THE WASHINGTON POST (May 30, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/21/a-guide-to-the-va-and-the-scandals-engulfing-it/>.

3. Ed O'Keefe, *What is the VA Accountability Act?*, THE WASHINGTON POST (May 21, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/05/21/what-is-the-va-accountability-act/>.

4. Sen. Marco Rubio et al., *Commentary: VA bureaucracy continues to protect bad employees, hurt U.S. troops*, AIR FORCE TIMES: VETERANS (May 11, 2017), <https://www.airforcetimes.com/veterans/2017/05/11/commentary-va-bureaucracy-continues-to-protect-bad-employees-hurt-u-s-troops/>.

5. U.S. CONST. amend. V.

6. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

process before taking significant adverse actions against employees. The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017⁷ violates the Fifth Amendment right to due process.

A. Due Process in Public Employment

The Civil Service was created in 1883 by the Pendleton Act⁸, which was a replacement to the previous spoils system.⁹ The spoils system was plagued by incompetence and corruption, because individuals were selected for governmental positions based upon political loyalty and not talent.¹⁰ The Pendleton Act was passed into law on January 16, 1883, in an attempt to reform federal employment by instituting a competitive exam-based hiring process.¹¹ This was to “[test] the fitness of applicants for the public service” and required the exams be “practical in their character” and “fair[ly] test the relative capacity and fitness” of the applicant.¹² The act also created the Civil Service Commission (CSC), a precursor to the Merit Systems Protection Board.¹³ The CSC was charged with evaluating and hiring employees through the competitive exams.¹⁴ However, due process was not included in the Civil Service until an Executive Order by William McKinley in 1897, mandating that no removals may be made from the Civil Service without just cause, a notice period, and an opportunity for the employee to respond.¹⁵

However, no legislation was passed into law to ensure that the McKinley Executive Order was followed until 1912, when the Lloyd-LaFollete Act¹⁶ was passed, codifying the just cause

7. See Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat. 862 (2017).

8. Pendleton Civil Service Reform Act of 1883, ch. 27, § 1, 22 Stat. 403.

9. U.S. MERIT SYSTEMS PROTECTION BOARD, WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? 3-5 (2015) [hereinafter *What is Due Process?*] (the “spoils system” stems from the phrase “the spoils of war”, the “war” being federal elections, and the “spoils” being the federal government positions that were awarded to political party supporters as a reward for political contributions).

10. *Id.* at 3-4.

11. *Id.*

12. Pendleton Civil Service Reform Act of 1883, ch. 27 § 2, 22 Stat. 403.

13. *Id.* at § 1.

14. *Id.* at § 2.

15. Exec. Order No. 101 (July 27, 1897), https://0-heinonline-org.libus.csd.mu.edu/HOL/Page?collection=presidents&handle=hein.presidents/prsex-cuo0001&id=284&men_tab=srchresults.

16. Lloyd-LaFollette Act of 1912, ch. 389, 37 Stat. 555.

standard and the required notice and opportunity to respond.¹⁷ Congress passed this act in an attempt to curtail adverse actions taken in reprisal for whistleblowing, and the statute granted the Civil Service Commission a right to review records pertaining to the adverse action.¹⁸ However, no right to a hearing or examination of witnesses was required under the Lloyd-LaFollete Act unless the official performing the removal provided them.¹⁹ Due to the limited scope, the focus at this time was on the procedure of the removal, not the cause of the removal.²⁰

In 1944, the Veterans' Preference Act²¹ arrived, granting returning World War Two veterans a preference in being hired into the Civil Service, and also giving those veterans a right to file an appeal with the Civil Service Commission for any major adverse actions.²² However, the Veterans' Preference Act did not require any federal agencies to follow the Civil Service Commissions' decisions, so the Veterans' Preference Act was amended in 1948 to require agencies to follow the CSC recommendations.²³ While the Veterans' Preference Act covered veterans, it was up to the individual agencies to decide what protections to grant non-veterans, if any.²⁴ However, agencies that had greater national security duties, like the Department of the Army, Mutual Security Agency, and the Veterans' Administration did extend the hearing and appeal rights to non-veterans for adverse actions rising from misconduct, poor performance, and malfeasance.²⁵

The watershed moment in federal civil service was in 1978, when Congress passed the Civil Service Reform Act (CSRA).²⁶ This disposed of the patchwork protections given to civil service employees from the previous legislation and executive orders mentioned, and transitioned all federal civil service employees to a consistent standard across all executive agencies.²⁷ This legislation also split the Civil Service Commission into the Merit

17. *Id.* at §6.

18. *What is Due Process?*, *supra* note 9, at 6.

19. *Id.*

20. *Id.* at 7.

21. Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387.

22. *What is Due Process?*, *supra* note 9, at 7.

23. *Id.* at 7-8.

24. *Id.* at 8.

25. SENATE COMMITTEE ON POST OFFICE AND CIVIL SERVICE, APPEALS AND GRIEVANCE PROCEDURES IN THE FEDERAL GOVERNMENT, 8 (1953).

26. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

27. *What is Due Process?*, *supra* note 9, at 9-10.

Systems Protection Board (MSPB), the Office of Personnel Management (OPM), and the Federal Labor Relations Authority (FLRA).²⁸ The CSRA gave the MSPB reviewing power over all adverse actions taken under the CSRA.²⁹ This legislation also enumerated the right for all civil service employees to have notice of the charges in an adverse action, a reasonable opportunity to respond, and the ability to appeal decisions in front of a neutral body.³⁰ This was the last major civil service law applicable to general service employees government wide; there have been subsequent laws pertaining to different types of employees and department specific changes, but many have been short lived.³¹

B. The History of the Veterans Administration and the History of the Department of Veterans Affairs

The Veterans Administration, the direct predecessor to the Department of Veterans Affairs, was created in 1930 by President Herbert Hoover, through Executive Order 5398.³² This order combined various World War I-era veterans programs, like the United States Veterans Bureau, the Bureau of Pensions, and the National Home for Disabled Volunteer Soldiers into one independent government agency.³³ The Veterans Administration would exist as an independent government agency until 1988, when the agency was renamed the “Department of Veterans Affairs” and elevated to a cabinet level position.³⁴

Recently, a few agency specific laws have been introduced that would have changed the Department of Veterans Affairs procedures on employee removals and adverse actions,³⁵ and one agency specific law that passed changed the VA handling of the Senior Executive Service, stripping many of the employee protections that Senior Executives were entitled to receive.³⁶ The 2014 Accountability Act, which was passed quickly with little

28. *See generally* Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111.

29. *Id.* (codified as amended at 5 U.S.C. §1205 (1982)).

30. *Id.* (codified as amended at 5 U.S.C. §7503 (1982)).

31. *What is Due Process?*, *supra* note 9, at 33, 36.

32. Exec. Order No. 5398, 38 C.F.R. §1.1 (1938).

33. *Id.*

34. Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527 §2.

35. *E.g.* H.R. 2189, 113th Cong. (2013); Demanding Accountability for Veterans Act of 2013, H.R. 2072, 113th Cong. (2013); Dep’t. of Veterans Aff. Mgmt. Accountability Act of 2014, H.R. 4031, 113th Cong. (2014).

36. Veterans’ Access to Care through Choice, Accountability, and Transparency Act of 2014, P.L. 113-146, 128 Stat. 1798 (codified at 38 U.S.C. §713 (2014)).

debate, significantly shortened the notice and response period mandated by the Fifth Amendment, and removes the opportunity for Senior Executives to appeal the Agency decision to the MSPB³⁷

C. Judicial Interpretation and Incorporation of Due Process

The judicial history of due process in public employment starts at the state level, with *Cleveland Board of Education v. Loudermill*.³⁸ The Court held that public sector employees, if a statute is in place that grants them just cause protection, have a property interest in their jobs, and due process is required under the Fifth Amendment to take away that property interest.³⁹

James Loudermill was an employee of the Cleveland Board of Education, and a civil servant.⁴⁰ Prior to his hiring, Loudermill claimed that he had never had been convicted of a felony, which was untrue.⁴¹ Upon the Board of Education discovering this dishonesty, he was removed from his job without an opportunity to respond to the charge or to challenge the decision.⁴² Ohio had a statute at the time that civil service employees were covered under just cause protection.⁴³ The Supreme Court held that the state could give the property right, in this case a job, but cannot freely take the property away or limit due process procedures that concern taken property.⁴⁴ The Court also held that if due process applies, the question becomes what process is due, and clarified that even if the facts of the adverse action were clear, due process was still required.⁴⁵ Removal without due process prior to termination is unconstitutional, and an employee must be given notice and opportunity to respond.⁴⁶ However, pre-termination procedures, while still required, can be abridged if a sufficient

37. See Ashton Habighust, *Enhancing Accountability at the Department of Veterans Affairs: The Legality of the Veterans Access, Choice, and Accountability Act of 2014 Under the Due Process Clause*, 64 CATH. U. L. REV. 1045, 1054-55 (2015) (discussing the unconstitutionality of the 2014 statute).

38. See generally *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985).

39. *Id.* at 538-39.

40. *Id.* at 535.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 541.

45. *Id.* at 538, 541.

46. *Id.* at 546.

post-termination procedure exists.⁴⁷

The *Loudermill* doctrine regarding an employee's property rights and the due process required to take that property has since been recognized by the Supreme Court as applicable to the federal civil service.⁴⁸ In *Lachance v. Erickson*⁴⁹ six federal civil service employees were removed after making false statements during investigations into misconduct that were independent grounds for an adverse action.⁵⁰ In the majority opinion, Chief Justice Rehnquist explicitly includes the *Loudermill* doctrine into the evaluation of whether these employees received adequate due process.⁵¹ The Federal Circuit has since stated that the federal statutory employment scheme creates a property interest in continued employment because it is specified that civil service employees may only be dismissed for cause or unacceptable performance.⁵² It does not matter that the Civil Service Reform Act does not explicitly state the need for due process,⁵³ the implication of the assurances for continued employment extend the Fifth Amendment to public sector employees.

Judicial doctrine, along with legislative history in the area of due process and property rights pertaining to civil service jobs, shows a clear indication of when due process applies. If the government has designated a job as having a just cause protection, this makes the job a property right.⁵⁴ Once the job is a property right, the government then has to provide procedures for adverse actions, including a notice procedure and an opportunity to respond.⁵⁵ In addition, the government can strike a balance between governmental needs and the risk of an erroneous property deprivation to determine how much process is due, but they cannot wholly deprive an individual of all due process.⁵⁶

The history of federal employees receiving due process protections for their job is long, and short of repealing the Civil Service Reform Act and the language that states a federal job

47. *Id.* at 547-48.

48. *What is Due Process?*, *supra* note 9, at 18.

49. *Lachance v. Erickson*, 522 US 262 (1998).

50. *Id.* at 264.

51. *Id.* at 266.

52. *Stone v. FDIC*, 179 F.3d 1368, 1374-1375 (Fed. Cir. 1999).

53. *See generally* Civil Service Reform Act of 1978, *supra* note 26.

54. *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997).

55. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

56. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), discussed *infra*.

shall have just cause protection, subsequent legislation must provide due process before adverse actions are taken. The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act)⁵⁷ unconstitutionally curtails employee due process rights. To show this, the Accountability Act will be compared to the Civil Service Reform Act to determine what procedures have changed, and then the Accountability Act will be evaluated using the *Matthews v. Eldridge* balancing test⁵⁸ to determine if the due process provided by the Accountability Act is sufficient. If the Accountability Act fails this balancing test, repeal seems to be the only way to remove the act, since the Federal Circuit Court overwhelmingly upholds the MSPB decision in federal employment cases and the MSPB decision is hamstrung by the Accountability Act requiring a low standard of proof in MSPB proceedings. Finally, this Accountability Act may in fact do nothing to improve the Department of Veterans Affairs and instead acts as a symbolic piece of legislation for anti-organized labor politicians, and an effort to privatize government services further.

III. CIVIL SERVICE REFORM ACT VS. THE NEW ACCOUNTABILITY ACT

The Civil Service Reform Act of 1978 forms the basis of most civil service jobs across the executive branch, and formed the basis of Title 5 of the U.S. Code.⁵⁹ Title 5 has two chapters that deal with adverse actions for all federal employees in the executive branch, Chapter 43 Performance Appraisal and Chapter 75 Adverse Actions.⁶⁰ The Accountability Act provides an alternative to be used solely by VA.⁶¹ There are significant differences between the Title 5 adverse action procedures and the adverse action procedures from the Accountability Act.

57. Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat. 862.

58. *Eldridge*, 424 U.S. at 335.

59. See generally Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111.

60. 5 U.S.C. § 7503 (2012); 5 U.S.C. § 7513 (2012); 5 U.S.C. § 4303 (2017) (as amended by P.L. 115-41).

61. Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat. 862 (codified at 38 U.S.C. § 714).

A. Title 5, Chapter 75: Adverse Actions

Chapter 75 Adverse Actions are split into two different levels of severity, with different procedures for each level. The first applies solely to suspensions of 14 days or less.⁶² This type of adverse action requires advanced written notice, a “reasonable time to answer” orally and in writing, the right be represented by an attorney or another representative, and a written decision with the specific reasons for suspension, provided at the “earliest practicable date”.⁶³ This minor reprimand is not appealable to the Merit Systems Protection Board (MSPB) unless another statute applies as well, such as in cases of whistleblowing or discrimination.⁶⁴

More serious adverse actions, such as removals, suspensions of more than 14 days, demotions in pay or grade, or furloughs for more than 30 days, receive more extensive procedure and protections under Chapter 75.⁶⁵ When taking adverse action against employees, the vast majority of federal executive branches prefer taking action under this section of the US Code.⁶⁶ A Chapter 75 adverse action is determined by managerial discretion, and can be taken for both conduct issues and performance issues.⁶⁷ The decision must be reasonable and for “such cause as will promote the efficiency of the service,” and the punishment must not be excessive to the charged behavior.⁶⁸ This test includes twelve “*Douglas* factors” to assess the reasonableness of the agency’s decision, but none of these twelve factors are controlling, and they require the agency to perform a balancing test to determine the proper discipline.⁶⁹ Even if the

62. 5 U.S.C. §7503 (2012).

63. *What is Due Process?*, *supra* note 9, at 27.

64. *Id.*

65. 5 U.S.C. § 7513 (2012).

66. U.S. MERIT SYSTEM PROTECTION BOARD, ADDRESSING POOR PERFORMERS AND THE LAW (Sept. 2009),

<https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=445841&version=446988&application=ACROBAT>. [hereinafter *Poor Performers*].

67. *Id.* at 3.

68. *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 337 (1981).

69. *Id.* at 332. The twelve factors for evaluation are:

- (1) The nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

Agency properly applies the *Douglas* factors, if (1) there was a harmful error in the application of the procedures, (2) the adverse action is discriminatory or in retaliation to whistleblowing, or (3) the decision was against the law in any other way, the decision shall not be upheld.⁷⁰

Along with the reasonableness evaluation, Chapter 75 removals have statutorily defined due process procedures.⁷¹ As stated in *Loudermill*, procedural due process for government employees with just cause protections include notice and an opportunity to respond.⁷² Chapter 75 has statutorily defined entitlements for employees who have an adverse action taken against them. When an agency proposes an adverse action, an employee is entitled to thirty days advanced written notice stating the reason for action, unless there is cause to believe the employee has committed a crime.⁷³ The employee is then allowed to answer the notice in a reasonable amount of time, with a minimum of seven days response time, and may be represented by an attorney or another representative.⁷⁴

Finally, the employee will receive a written decision at the “earliest practicable date”, and may appeal this decision to the MSPB.⁷⁵ Once appealed to the MSPB, the agency’s decision must

(3) The employee’s past disciplinary record;

(4) The employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) The effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in the employee’s ability to perform assigned duties;

(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) Consistency of the penalty with any applicable agency table of penalties;

(8) The notoriety of the offense or its impact upon the reputation of the agency;

(9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) Potential for the employee’s rehabilitation;

(11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

70. 5 U.S.C. § 7701(c)(2) (2012).

71. 5 U.S.C. § 7513(b) (2012).

72. *Loudermill*, 470 U.S. at 542.

73. 5 U.S.C. § 7513(b)(1) (2012).

74. 5 U.S.C. §§ 7513(b)(2)-(3) (2012).

75. 5 U.S.C. § 7513(b),(d) (2012).

be supported by a preponderance of the evidence⁷⁶, or in other words, “the agency has the burden to prove it is more likely than not that the conclusion reached was *correct*.”⁷⁷ If the action taken by the agency does not meet the *Douglas* factors, the MSPB can mitigate and modify the agency’s penalty.⁷⁸ This system was carefully crafted to fit closely with the Constitution and to make sure that adverse actions “stick” while preserving employee’s Constitutional rights.⁷⁹

B. Title 5, Chapter 43: Performance Appraisal

Adverse actions taken under Title 5, Chapter 43 are exclusively actions taken due to poor performance of an employee in a critical element of the job. The procedures under Chapter 43 are similar, but have two notable differences. First, Chapter 43 actions have a lower standard of proof, only requiring substantial evidence upon appeal, and second, a performance improvement plan (PIP) must be proposed and implemented prior to the adverse action.⁸⁰ As the Merit Systems Protection Board reports, “[t]he use of a PIP is the primary trade-off supervisors must accept if they want to use the lower burden of proof that Chapter 43 offers.”⁸¹

A performance improvement plan typically includes clear performance standards, how those standards will be measured, any assistance the agency will offer the employee to improve, and specifies how long the PIP will remain in place.⁸² PIPs are supposed to be flexible based upon job description and agency need, so there isn’t a strict list of things that a PIP must include, just a recommended list from which the agency can pick and choose.⁸³

The *Douglas* factors are not required for a Chapter 43 action, and the MSPB cannot mitigate the penalty the agency chooses to use in the adverse action.⁸⁴ The key appellate proof in Chapter 43 actions, which is not required in Chapter 75 actions, is the

76. 5 U.S.C. § 7701(c)(1)(B) (2012).

77. *Poor Performers*, *supra* note 66, at 7.

78. *Id.* at 10.

79. *What is Due Process?*, *supra* note 9, at 30.

80. *Poor Performers*, *supra* note 66, at 7.

81. *Id.*

82. *Id.* at 8.

83. *Id.*

84. *Id.* at 9-10.

“critical element.” A critical element “means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee’s overall performance is unacceptable.”⁸⁵ The critical element must be specified in the PIP, and must inform the employee of the expected acceptable performance.⁸⁶ If the critical element is not clear, it can only be clarified, and not rewritten.⁸⁷ Critical elements that are beyond salvage, to the point the element needs to be rewritten, cannot be used for a Chapter 43 action.⁸⁸

Chapter 75 can be used for performance-based adverse actions as well, but all Chapter 75 procedures must be followed.⁸⁹ Due to the higher initial burden on management to be proactive in Chapter 43 actions, and the pressure for the PIP to be written correctly, Chapter 43 was used approximately 42% of the time in FY 2007, while Chapter 75 was used in approximately 58% of adverse actions taken in that same year.⁹⁰ The Department of Veterans Affairs between FY 1998 and FY 2007 resembles a similar split, with the VA preferring Chapter 75 actions 62% of the time, and only using Chapter 43 actions 38% of the time.⁹¹

C. Title 38, Chapter 7: Veterans Affairs Employees

On June 23rd, 2017, the Accountability Act was passed into law, and created a third way to take adverse actions against employees working for the Department of Veterans Affairs. The Accountability Act includes all employees who work for the Department, except for senior executives⁹², political appointees⁹³, probationary employees⁹⁴, and specialized employees such as physicians, medical center directors, and others.⁹⁵ The employees

85. 5 C.F.R. §430.203 (2018).

86. Poor Performers, *supra* note 66, at 10.

87. *Id.*

88. *Id.*

89. *Id.* at iii.

90. *Id.* at 13-14.

91. *Id.* at 15.

92. 38 U.S.C. § 714(h)(1)(A) (2012).

93. 38 U.S.C. § 714(h)(1)(D) (2012).

94. 38 U.S.C. § 714(h)(1)(C) (2012).

95. 38 U.S.C. § 714(h)(1)(B) (2012) (referring to 38 U.S.C. §§7306, 7401(1), 7401(4), 7405 (“an individual appointed pursuant to sections 7306, 7401(1), 7401(4), or 7405 of this title”

Section 7306 is the controlling section for the Office of the Under Secretary of Health

not excluded have received a sharp decrease in due process from this Accountability Act, in direct contrast to the carefully constructed process from the CSRA.

Adverse actions taken under the Accountability Act are taken at the Secretary of Veterans Affairs's discretion, and can be taken for either misconduct or poor performance.⁹⁶ The Secretary can remove, suspend, or demote any individual covered by the act with little due process.⁹⁷ After the Secretary makes this decision, the aggregate time for notice, response, and final decision is set at a maximum of 15 business days.⁹⁸ During those 15 days, a seven day block of time is allotted to the individual for a response.⁹⁹ After 15 business days have passed, it is statutorily required for the Secretary to issue a final decision in writing.¹⁰⁰

The law provides for a modified and expedited appellate review of the decision at the MSPB by an administrative judge¹⁰¹ The appeal must be filed within 10 business days after the final decision has been made.¹⁰² After receiving the appeal, the administrative judge has 180 days to complete the case and issue a final decision.¹⁰³ The standard of review is notably lower for these §714 removals than for removals taken under the CSRA. For these §714 removals, the standard of evidence used is "substantial evidence", and agency decisions that are supported by substantial evidence must be deferred to by the administrative judge, and cannot be mitigated.¹⁰⁴ Substantial evidence is defined

Section 7401(1) applies to "Physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries."

Section 7401(4) applies to "Directors of medical centers and directors of Veterans Integrated Service Networks with demonstrated ability in the medical profession, in health care administration, or in health care fiscal management."

Section 7405 applies temporary full-time appointments, part-time appointments, and without-compensation appointments in positions listed under 7401(1), 7401(3) (various healthcare professionals not specified under 7401(1) who provide direct health care to veterans), librarians, and "Other professional, clerical, technical, and unskilled personnel (including interns, residents, trainees, and students in medical support programs)."

96. 38 U.S.C. § 714(a)(1) (2012).

97. 38 U.S.C. § 714(a)(2)(A)-(C) (2012).

98. 38 U.S.C. § 714(c)(1)(A) (2012).

99. 38 U.S.C. § 714(c)(1)(B) (2012).

100. 38 U.S.C. § 714(c)(2) (2012).

101. 38 U.S.C. § 714(d)(1) (2012).

102. 38 U.S.C. § 714(c)(4)(B) (2012).

103. 38 U.S.C. § 714(d)(1) (2012).

104. 38 U.S.C. § 714(d)(2)(B) (2012).

as “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.”¹⁰⁵ This is the same standard of evidence used in Chapter 43 Performance Appraisals, and a lower standard of review than used in Chapter 75 Adverse Actions.¹⁰⁶ The employee may then appeal to the United States Federal Circuit Court of Appeals, where the court will review the record and set aside any agency action that is (1) found to be arbitrary or capricious, (2) not following the required laws, rules, or regulation, or (3) a decision unsupported by substantial evidence.¹⁰⁷ This Federal Circuit standard had only been used for §7401(1) employees, who were largely white-collar professionals,¹⁰⁸ until the new Accountability Act, which extends this standard to every covered employee.¹⁰⁹ This change in standards at both appellate levels essentially hamstring the court system into following the Agency decision, unless the Agency decision is so egregious that no reasonable person could find that the Agency made the correct decision.

The VA cannot have its cake and eat it too. The Accountability Act combines parts of both Chapter 43 (lower standard of proof) and Chapter 75 (does not have to give the employee an opportunity to improve) most preferable to the Agency, slaps on an onerous time period for the average worker, and hamstring the courts, creating a law that is misguided, unjust, and unconstitutional.

IV. THE ACCOUNTABILITY ACT LACKS SUFFICIENT DUE PROCESS UNDER THE *MATHEWS V. ELDRIDGE* BALANCING TEST

The Accountability Act unconstitutionally strips employees of their requisite due process by imposing short time periods in the pre-termination process and hamstringing the appellate courts in the post-termination process. As discussed *supra*, federal employees have a property interest in their job due to the Civil Service Reformation Act, and are constitutionally required to have Fifth Amendment due process prior to the taking of that

105. 5 C.F.R. § 1201.4(p) (2018).

106. Poor Performers, *supra* note 66, at iv.

107. *See generally* 5 U.S.C. §706 (2012).

108. 38 U.S.C. § 7401(1) (2012) applies to “Physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.”

109. 38 U.S.C. §714 (h)(1)(a)-(d) (2012).

property.¹¹⁰ The courts must perform a balancing test to consider whether sufficient due process has been given to an employee who has had an adverse action taken against them.¹¹¹

The balancing test comes from *Mathews v. Eldridge*,¹¹² and has been adopted for use in evaluating the extent of due process needed for adverse actions taken against government employees.¹¹³ The three components of this test are: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest."¹¹⁴ Applying this *Mathews* test will show that the due process given to employees through the Accountability Act is insufficient.

A. Prongs 1 and 3: Private and Government Interests

The first and third prongs of the test are not in dispute. It is well-established case law that an employee has a private interest in continuing to receive a paycheck, and it is equally well established that the federal government needs to be able to discipline underperforming employees, criminal employees, and other employees guilty of malfeasances.¹¹⁵

B. Prong 2: Balancing the Risk of Erroneous Deprivation

The second prong is where the Accountability Act will fail; the risk of erroneous deprivation is too high, and the procedural safeguards have been trimmed back to the point that they hold little probative value. Suspensions are allowed to have a lower due process standard than removals, but both require this balancing test to be completed.¹¹⁶ The length and the finality of the deprivation are dispositive factors in the second prong.¹¹⁷

110. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

111. *Id.* at 542-43.

112. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

113. *Gilbert v. Homar*, 520 U.S. 924, 931-32 (1997).

114. *Id.* at 931-932 (quoting *Mathews*, 424 U.S. at 335).

115. *E.g.*, *Gilbert*, 520 U.S. at 928-29; *Cleveland Board of Education v. Loudermill*, 470 U.S. 552 (1985); *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 435 (1982).

116. *Gilbert*, 520 U.S. at 934-35.

117. *Id.* at 932.

The risk of erroneous deprivation is too high for employees. The short time period given does not allow an employee to seek adequate legal representation to navigate the notice and response period, along with any appeals. The level of due process given must be related to the finality and seriousness of the deprivation, and nothing is more final or serious than a permanent removal. When a state must act quickly, like when employees have committed serious crimes at work, the opportunity to respond may occur after the employee has been deprived of the job.¹¹⁸ The Sixth Circuit found that pre-termination proceedings and post-termination proceedings are fundamentally intertwined, so a deficit in one can be made up in the other.¹¹⁹ In *Carter v. Western Reserve Psychiatric Habilitation Center*, an employee was terminated and the pre-termination proceedings were abbreviated.¹²⁰ Due to abbreviated pre-termination proceedings, the Court stated that post-termination hearings must be “substantially more meaningful” in the interest of due process.¹²¹

The Accountability Act provides neither adequate time for notice and response in the pre-termination phase, nor does the Act provide an adequate post-termination hearing. The shortened time period before the adverse action takes place may be permissible if the standard of evidence had not been lowered to a nearly impossible-to-beat standard. The substantial evidence standard used by the MSPB and the Federal Circuit is so low of a standard that it stands to reason that there is no meaningful due process.

This substantial evidence standard was previously used after performance improvement plans and meetings with the employee happened, pursuant to Chapter 43 actions. This paper trail, and the opportunity to improve was a significant pre-termination proceeding and struck a balance between the needs of the employee and the needs of the employer. Chapter 75 adverse actions had less paperwork, but a higher evidentiary standard, providing the employee more meaningful post-termination due process. The Accountability Act leads to employees having adverse actions taken against them and lost appeals in both the

118. *Id.* at 930.

119. *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985).

120. *Id.* at 272.

121. *Id.* at 273, 274 (internal quotations omitted)(The substance of the post-termination hearings was unclear, as it was not included in the record sent to the Sixth Circuit Court of Appeals).

MSPB and the Federal Circuit because a reasonable person may determine that the record adequately supports the same conclusion as the VA, even if that reasonable person believes the opposing view is more compelling. Not only is the risk of erroneous deprivation too high for the employee, the risk is too high for the government as well.

The second stated purpose of the Accountability Act is “whistleblower protection”. The VA has been ravaged by retaliation against whistleblowing under the old due process scheme.¹²² VA clinics have been accused of using “sham peer reviews to permanently sabotage doctors’ credibility. Physicians truly face losing their livelihood”.¹²³ The whistleblowing has been widely covered in the news and was part of the justification in passing the Accountability Act.¹²⁴

Whistleblower retaliation is growing worse under the Trump administration, with one VA physician referring to the time period after the Accountability Act had been passed as “open season across the nation on VA whistleblowers”.¹²⁵ Whistleblower offices that are being held “in-house” are often referred to as “Trojan horses used to identify whistleblowers for retaliation”.¹²⁶ It is counterintuitive for the Trump administration and the 115th Congress to pass a law that simultaneously allows the federal government to make it easier to fire workers, while allegedly guaranteeing these same workers whistleblower protections from retaliatory firings.

The Accountability Act fails the second prong of the *Mathews v. Eldridge* test: “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional [or substitute] procedural safeguards”.¹²⁷ VA employees are being erroneously deprived of their jobs due to the

122. Josh Hicks, *VA Employees Testify About Retaliation Against Whistleblowers*, THE WASHINGTON POST (Jul. 9, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/07/09/va-employees-testify-about-retaliation-against-whistleblowers/>.

123. *Id.* (Internal quotation marks omitted).

124. Sen. Marco Rubio et. al, *Commentary: VA Bureaucracy Continues to Protect Bad Employees, Hurt U.S. Troops*, MILITARY TIMES (May 11, 2017) <https://www.militarytimes.com/veterans/2017/05/11/commentary-va-bureaucracy-continues-to-protect-bad-employees-hurt-u-s-troops/>.

125. Joe Davidson, *Victims Say VA Whistleblower Retaliation is Growing Under Trump, Despite Rhetoric*, THE WASHINGTON POST (Oct. 30, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/10/30/victims-say-va-whistleblower-retaliation-is-growing-under-trump-despite-rhetoric/>.

126. *Id.*

127. *Mathews*, 424 U.S. at 321.

lower standards of the Accountability Act, often in retaliation for whistleblowing, a protected activity. The procedural safeguards have little value due to the speed and ease that the VA has with firing employees.

V. REPEALING OR OVERRULING THE ACT

This Accountability Act is unconstitutional and should be repealed by the legislature or declared unconstitutional by the judiciary. After coming to the conclusion that the Accountability Act is unconstitutional, the question remains: how does one go about striking the Act from U.S. Code? The answer may come down to a future Congress. Other statutes that modify the Civil Service Reform Act on an agency-specific basis are notably short, and many have been repealed by a later Congress.¹²⁸ For example, the 1996 Department of Transportation and Related Agencies Appropriations Act¹²⁹ removed the Federal Aviation Administration (FAA) from the jurisdiction of the MSPB completely, and then the Wendell H. Ford Investment and Reform Act for the 21st Century¹³⁰ mostly put the FAA back under MSPB jurisdiction.¹³¹ It may be necessary that a more employee-rights focused Congress will do a similar thing with the Accountability Act, and restore employee rights in the VA.

The Accountability Act was passed on a bipartisan basis, and thus a change in leadership in Congress and the Presidency may not be enough to repeal the act. The final vote counts of the act in the House of Representatives were 368 in favor, and 55 opposed, with seven representatives not voting.¹³² On a partisan basis, 231 Republicans and 137 Democrats voted in favor of this Act, and 1 Republican and 54 Democrats voted against the Act.¹³³ The Senate passed the Act on a voice vote, so no record of individual votes were made by Senators.¹³⁴ A small window into

128. *What is Due Process?*, *supra* note 9, at 36.

129. Department of Transportation and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-50, 109 Stat. 436 (1995).

130. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (2000).

131. *Id.*

132. *S. 1094: Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/votes/115-2017/h307> (last visited Jan. 19, 2018).

133. *Id.*

134. *S. 1094: Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017*, GOVTRACK (last updated June 14, 2017),

the Senate proceedings on the bill would be looking at the co-sponsors of the bill, which were made up of 31 Republicans, 7 Democrats, and 1 Independent,¹³⁵ who joined the lead sponsor, Sen. Marco Rubio (R-FL) in passing this bill.¹³⁶ President Donald Trump eagerly supported the bill, tweeting to the internet that:

The passage of the @DeptVetAffairs Accountability and Whistleblower Protection Act is GREAT news for veterans! I look forward to signing it!¹³⁷

Other laws with similar means and ends also passed with bipartisan support. The Veterans Access to Care through Choice, Accountability, and Transparency Act of 2014, which limited due process for senior executives in the VA passed 91-3 in the Senate and 420-5 in the House of Representatives.¹³⁸ President Obama signed the 2014 bill into law with little delay.¹³⁹ Both laws limit federal employee rights, and both laws were passed on a bipartisan basis. The Accountability Act is already being treated as a foundation and model for future accountability acts that will affect other executive departments.¹⁴⁰ Both the Labor

<https://www.govtrack.us/congress/bills/115/s1094>.

135. *S. 1094: Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017*, Details, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s1094/details> (last visited Dec. 21, 2018).

136. *S. 1094: Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017*, Summary, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s1094/summary> (last visited Dec. 21, 2018).

137. Donald Trump, (@realDonaldTrump), TWITTER (Jun. 13, 2017, 4:18 PM), <https://twitter.com/realDonaldTrump/status/874767922295705600>; Pres. Trump also tweeted support for the bill after it was initially passed by the Senate and sent to the House of Representatives, stating, "Senate passed the VA Accountability Act. The House should get this bill to my desk ASAP! We can't tolerate substandard care for our vets." Donald Trump, (@realDonaldTrump), TWITTER (Jun. 6, 2017, 6:07 PM), <https://twitter.com/realDonaldTrump/status/872258719404482561>.

138. All those who voted against the 2014 Act in both the Senate and the House of Representatives were Republicans; GOVTRACK, *H.R. 3230 (113th): Veterans Access, Choice, and Accountability Act of 2014, Senate Vote #254 in 2014 (113th Congress)*, <https://www.govtrack.us/congress/votes/113-2014/s254> (last visited Sept. 30, 2018); GOVTRACK, *H.R. 3230 (113th): Veterans Access, Choice, and Accountability Act of 2014, House Vote #467 in 2014 (113th Congress)*, <https://www.govtrack.us/congress/votes/113-2014/h467> (last visited Sept. 30, 2018); See Ashton Habighurst, *Enhancing Accountability at the Department of Veterans Affairs: The Legality of the Veterans Access, Choice, and Accountability Act of 2014 Under the Due Process Clause*, 64(4) Cath. U. L. Rev. 1045, 1054-55 (2015).

139. Cameron Brenchley, *President Obama Signs Bill to Give the VA the Resources It Needs*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, BLOG (Aug. 7, 2014), <https://obamawhitehouse.archives.gov/blog/2014/08/07/president-obama-signs-bill-give-va-resources-it-needs>.

140. Nicole Ogrysko, *House Bills Would Extend Same VA Removal Authorities to*

Department Accountability Act¹⁴¹ and the Education Department Accountability and Whistleblower Protection Act¹⁴² were introduced into the House of Representatives in December 2017, though neither has gained much traction.¹⁴³ In the interim, President Trump has since signed an Executive Order instructing all executive agencies to push for more removals under Title 5, and forbidding contract bargaining negotiations over removal procedures.¹⁴⁴

However, in 2018 there has been a bipartisan pushback in the House of Representatives and the Senate regarding the way the Accountability Act is being executed by the VA. Members of the Committee on Veterans' Affairs in the Senate wrote letters to then Secretary Shulkin and to the VA Inspector General, Michael J. Missal.¹⁴⁵ A February 13, 2018 letter from Senator Tammy Duckworth (D-IL) to Shulkin contained criticisms about the bill being used primarily to remove front-line workers like housekeeping aids, cooks, and laundry workers instead of higher-ranking VA personnel such as supervisors who are experiencing performance problems or committing misconduct.¹⁴⁶ A February 26, 2018 letter from Jon Tester (D-MT), Richard Blumenthal (D-CT), et. al, states that the VA has ceased using progressive discipline, and managers in the VA are removing employees for first offenses such as moving too slowly after returning from

Labor, Education Secretaries, FEDERAL NEWS RADIO (Feb. 28, 2018), <https://federalnewsradio.com/legislation/2018/02/house-bills-would-extend-same-va-removal-authorities-to-labor-education-employees/>.

141. Department of Labor Accountability Act of 2017, H.R. 4703, 115th Cong. § 1.

142. Department of Education Accountability and Whistleblower Protection Act of 2017, H.R. 4702, 115th Cong. § 1.

143. Both bills have gained only four sponsors and cosponsors, and both bills have the same four representatives, Rep. Francis Rooney (R-FL), Rep. Lloyd Smucker (R-PA), Rep. Ralph Norman (R-SC), and Rep. Matt Gaetz (R-FL). Rep. Smucker introduced the Labor Dept. bill and Rep. Rooney introduced the Ed. Dept. bill. Both Bills were referred to committee on December 20, 2017 and have had no further action taken. *H.R. 4702 – Department of Education Accountability and Whistleblower Protection Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4702/> (last visited Sept. 30, 2018); *H.R. 4703 – Department of Labor Accountability Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4703/> (last visited Sept. 30, 2018).

144. Exec. Order No. 13839, 83 Fed. Reg. 25, 343 (June 1, 2018).

145. See, e.g. Letter from Sen. Tammy Duckworth, U.S. Senate to Sec'y David Shulkin, Dep't of Veterans Affairs (Feb. 13, 2018), <https://www.duckworth.senate.gov/imo/media/doc/2018.02.13%20-%20Letter%20to%20Sec.%20Shulkin%20re%20VA%20Accountability%20&%20Whistleblower...pdf>.

146. *Id.*

injury, or for missing a deadline.¹⁴⁷ A June letter was sent to Missal, stating that the VA was not reporting to Congress about the implementation of the Accountability Act, and that Senators on the Committee on Veterans' Affairs were receiving reports that the law was being used in an inconsistent and inappropriate manner.¹⁴⁸ House Representative Brian Fitzpatrick introduced a bill in the House of Representatives on June 14, 2018 that would repeal parts of the Accountability Act and make VA employees again subject to the same removal, demotion, and suspension policies as other employees of the Federal Government.¹⁴⁹ If the Accountability Act continues to fail, and to gain bipartisan opposition, removing the Act through the legislature would be the best way to restore worker's rights in the VA.

It is unlikely that the Accountability Act will be seen by a court to determine its constitutionality. Federal employees have to appeal the agency decision to the MSPB and to the Federal Circuit Court. The Federal Circuit Court is primarily a patent court and is ill-suited to deal with employee due process claims.¹⁵⁰ Accordingly, the Federal Circuit shows substantial deference to the MSPB decision, overturning only a small portion of MSPB decisions.¹⁵¹ With a lower standard of evidence specified by the

147. Letter from Sen. Jon Tester et. al, US Senate to Sec'y David Shulkin, Dep't of Veterans Affairs (Feb. 26, 2018),

https://admin.govexec.com/media/gbc/docs/pdfs_edit/031318valetter.pdf.

148. Letter from Sen. Jon Tester et. al, US Senate to Michael J. Missal, Inspector Gen. at the Dep't of Veterans Affairs (Jun. 15, 2018),

<https://www.veterans.senate.gov/imo/media/doc/2018-06-15%20Accountability%20and%20Whistleblower%20Protection%20Act.pdf>.

149. GOVTRACK, *H.R. 6101(115th): VA Personnel Equity Act of 2018*,

<https://www.govtrack.us/congress/bills/115/hr6101> (last visited Jan. 25, 2019); *See also* GOVTRACK, *H.R. 6101: VA Personnel Equity Act of 2018*,

<https://www.govtrack.us/congress/bills/115/hr6101/details> (last visited Jan. 25, 2019).

150. At the end of 2017, the Federal Circuit had 61 currently pending MSPB appeals before it, 6 pending appeals from the Department of Veterans Affairs, 639 pending appeals from the Patent and Trademark Office, and 524 pending patent appeals from the District Courts. The Federal Circuit had 1,578 cases currently pending, with more than 6 in 10 cases being related to patents. U.S. CT. OF APPEALS FOR THE FED. CIR., *Year-to-Date Activity as of December 31, 2017*,

[http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/YTD-Activity-](http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/YTD-Activity-December-2017.pdf)

[December-2017.pdf](http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/YTD-Activity-December-2017.pdf); The total appeals filed are a little more promising, but not by much. Patent and trademark cases make up approximately 65% of appeals filed in the Federal Circuit, MSPB and personnel management appeals make up 11% of the filed cases. U.S. CT. OF APPEALS FOR THE FED. CIR., *Appeals Filed, by Category FY 2017*, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY_17_Filings_by_Category.pdf.

151. Only 9% of MSPB cases were reversed by Federal Circuit judges in the twelve-month period ending on September 30, 2017. U.S. CT. OF APPEALS FOR THE FED. CIR.,

Accountability Act, even more deference may be given to the MSPB decision, and thus the Agency decision. After a review of Federal Circuit case law dealing with federal employee due process, decisions in favor of employees claiming to lack due process in federal employment decisions are generally found when *ex parte* communication has occurred between the proposing official and the deciding official.¹⁵²

The chances are slim that the Accountability Act will even be heard by the Supreme Court of the United States. The Supreme Court has between 7,000 and 8,000 cases filed each year, but historically only takes on approximately 80 cases each year.¹⁵³ This number has fallen in recent years, with the Supreme Court hearing only 71 cases in the 2014 term¹⁵⁴, and only 70 cases in the 2016 term¹⁵⁵, the lowest numbers since World War II.¹⁵⁶ It would be unexpected for the Supreme Court to review a case regarding the Accountability Act, and should not be counted on in efforts to

Table B-8 U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended September 30, 2017, http://www.cafc.uscourts.gov/sites/default/files/the-court/Appeals_Filed_Terminated_Pending_2017.pdf (last visited Jan. 25, 2019). The two prior years 2015 and 2016 have 6% and 4%, respectively, of MSPB cases reversed by the Federal Circuit. U.S. CT. OF APPEALS FOR THE FED. CIR., *Table B-8 U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended September 30, 2015*, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/appeals_filed_terminated_and_pending.pdf (last visited Jan. 25, 2019); U.S. CT. OF APPEALS FOR THE FED. CIR., *Table B-8 U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended September 30, 2016*, http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY16_Appeals_Filed_Terminated_and_Pending_2.pdf (last visited Jan. 25, 2019).

152. See *Young v. Department of Housing and Urban Development*, 706 F.3d 1372, 1376 (Fed. Cir. 2013); *Stone v. FDIC*, 179 F.3d 1368, 1374-1375 (Fed. Cir. 1999); but see, *Hull v. Dept. of Air Force*, 374 Fed. Appx. 981, 982 (Fed. Cir. 2010). *Ex parte* communication requires an analysis under *Stone*, but the analysis is not relevant to the Accountability Act outside the fact that the Federal Circuit generally finds in favor of employees in these types of cases.

153. Of the approximately 180 cases per year, about 80 cases receive plenary review along with oral arguments, and about 100 cases are decided without plenary review. SUP. CT. OF THE U.S., *The Justices' Caseload*, <https://www.supremecourt.gov/about/justicecaseload.aspx> (last visited Dec. 21, 2018).

154. Oliver Roeder, *The Supreme Court's Caseload Is On Track To Be The Lightest In 70 Years*, FIVE THIRTY EIGHT (May 17, 2016), <https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/>.

155. SUP. CT. OF THE U.S., *Opinions of the Court – 2016* (last updated Dec. 10, 2018), <https://www.supremecourt.gov/opinions/slipopinion/16>.

156. Roeder, *supra* note 154.

repeal the Act.¹⁵⁷ Even if the Supreme Court were to review the Accountability Act— and until this happens— federal employees will continue to be improperly and unconstitutionally removed from their jobs and losing their livelihood.

VI. REAL PURPOSE OF THE ACT

The Accountability Act changes many terms of public employment at the VA, but the Act does not fundamentally change the reasoning used to fire workers with performance issues or workers who have committed crimes; the law only affects the time periods and standards of review. Over 500 VA employees were fired between January 20, 2017, and July 7, 2017.¹⁵⁸ This is, on average, 100 firings per month. Between January 20, 2017 and December 31, 2017, the VA removed 1,440 employees, averaging 140 removals per month. Across the entire federal government, 77,000 full time employees were removed between 2000 and 2014, averaging 5,000 per year.¹⁵⁹ Bad employees were already being fired before this Accountability Act was passed, but those employees retained their due process rights.

The Accountability Act instead is both a push for a privatization of veteran care and a push to bust public sector unions. Over 49,000 job positions are open at the VA across the nation, and the failure to fill these empty positions has caused protests outside of the VA hospitals with demands that these positions be filled.¹⁶⁰ An internal memorandum sent on April 14,

157. Interestingly, in 2016, a case involving the MSPB was appealed to the Supreme Court, and the court sided with the employee. *Perry v. MSPB* involved a question of appellate procedure, specifically if federal employees could file a discrimination claim in federal district court, even if that same claim was dismissed by the MSPB for lack of jurisdiction. The court found in favor of the employee on a 7-2 basis (Justices Gorsuch and Thomas dissenting). *Perry v. Merit Systems Protection Bd.*, 137 S.Ct. 1975 (2017).

158. While the Accountability Act was signed into law on June 14, 2017, the Act requires the VA to disclose the number of removals weekly in a running total, with the first report coming out the week of July 7, 2017. Prior to this required reporting, the VA did not disclose the number of removals. Using the July 7 date provides the best estimate of removals under the old system. DEPT. OF VETERANS AFF., *Accountability Report* (Feb. 7, 2018),

https://www.va.gov/accountability/Adverse_Actions_Report_2017_050418_1.pdf; Joe Davidson, *VA fires more than 500 feds under Trump, even before new accountability law*, THE WASHINGTON POST, (Jul. 9, 2017),

<https://www.washingtonpost.com/news/powerpost/wp/2017/07/10/va-fires-more-than-500-feds-under-trump-even-before-new-accountability-law/>.

159. *What is Due Process?*, *supra* note 9, at 41.

160. FederalSoup Staff, *VA Hospital Employees Protest Unfilled Vacancies*,

2017 from former Secretary Shulkin, was obtained by the Associated Press.¹⁶¹ In that memorandum, Shulkin stated that the VA will become leaner and that the VA will adopt a long-term plan to outsource veteran health needs to private hospitals.¹⁶² This memo implies that these positions will never be filled.¹⁶³ However, former Secretary Shulkin claims that he was fired from the VA for being opposed to privatization.¹⁶⁴

This Act is also a union-busting bill in disguise. The Accountability Act has certain clauses that state it directly overrules any existing collective bargaining agreement between unions and the federal government, and forces unions to follow the same time periods in any grievances.¹⁶⁵ The largest union that represents VA employees is the American Federation of Government Employees (AFGE), and they have been loudly outspoken over the affects this act will have on employees, the VA, and the union itself.¹⁶⁶ The President of the AFGE, J. David Cox Sr., stated in testimony before the Senate Veterans Affairs Committee, that the Act “decreases accountability at the VA, it eviscerates the agency it is supposed to improve, and ensures that no employee ever gets a fair shake on any proposed adverse action”.¹⁶⁷ Cox went on to explain that the VA’s true problem is the severe shortage of employees working, leading to long hours and increased burn out.¹⁶⁸

FEDERALSOUP (Sep. 08, 2017), <https://federalsoup.com/articles/2017/09/08/va-hospital-employees-demand-vancancies-be-filled.aspx>.

161. ASSOCIATED PRESS, *Thousands of Jobs to Remain Unfilled in Trump's Veterans Affairs Department*, NEW YORK DAILY NEWS (Apr. 26, 2017) <http://www.nydailynews.com/news/national/thousands-jobs-remain-unfilled-trump-va-article-1.3103936>.

162. *Id.*

163. *Id.*

164. David J. Shulkin, *David J. Shulkin: Privatizing the V.A. Will Hurt Veterans*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/opinion/shulkin-veterans-affairs-privatization.html>; Laurel Wamsley & Scott Neuman, *Fired VA Secretary Says White House Muzzled Him*, NPR (Mar. 29, 2018) <https://www.npr.org/sections/thetwo-way/2018/03/29/597866101/fired-va-secretary-says-white-house-muzzled-him>.

165. 38 U.S.C. § 714(c)(1)(D) (2012); 38 U.S.C. § 714(c)(10) (2012).

166. Statement by J. David Cox, Sr., Nat'l President, Am. Fed. of Gov't Emp.'s, AFL-CIO before the Comm. On Veterans' Affairs (May 17, 2017).

167. *Id.*

168. *Id.*; see also Joe Davidson, *Loss of VA Health-Care Providers Grows as Demand for Care Increases. Will Service Suffer?*, WASH. POST (Aug. 2, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/08/02/demand-for-va-health-care-increases-but-so-does-the-loss-of-health-care-providers/?utm_term=.aa32dad0f8bc.

All of these secondary purposes of the Accountability Act are similar to the “starve the beast” strategy embraced by modern conservatives. First taxes are cut, and then once the money coming into the federal government has dried up, programs are cut in an effort to balance the budget.¹⁶⁹ This idea is summarized by Grover Norquist, President of the Americans for Tax Reform, who stated “I don’t want to abolish government. I simply want to reduce it to the size where I can drag it into the bathroom and drown it in the bathtub.”¹⁷⁰ In the recent changes at the VA, employees are being cut to levels inadequate to staff facilities, and the quality of service has declined.¹⁷¹ This drop in quality of service is brought forward by the news media, and in response, politicians make further changes that only harm workers. At this rate, the obvious next step will be to cut the VA itself to make the system “leaner” and more reliant on private sector health services.

VII. CONCLUSION

This new law is unjust to workers, misguided in scope and purpose, and is ultimately unconstitutional. A federal employee that has just cause job protection has a property right to their job. The Fifth Amendment states that the federal government cannot take property away from an individual without due process. Due process requires that an individual receive notice, have an opportunity to respond, and be allowed an appeal to a neutral third party. The reasonableness of procedures performed whenever the government is taking property away from an individual is evaluated under *Matthews v. Eldridge*. The Accountability Act fails the *Matthews v. Eldridge* balancing test, making any removal of a federal employee since the enactment of this law a violation of due process. There is little judicial opportunity to strike this act as unconstitutional. It is unclear if workers’ constitutionally protected rights will be reinstated, and it is unlikely that any of the already removed workers will be made whole. However, there is rising political distaste toward the Accountability Act, and the most prudent way to remove this law is to repeal it through legislative processes.

169. Bruce Bartlett, “Starve the Beast” *Origins and Development of a Budgetary Metaphor*, XII No. 1 *Indep. Rev.* 5, 5 (2007).

170. Mara Liasson, *Conservative Advocate*, NPR (May 25, 2001) <https://www.npr.org/templates/story/story.php?storyId=1123439>.

171. Cox, *supra* note 166.